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SUPREME COURT, U.S.
FILED
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No. 488

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

CHARLES O. PORTER,

Petitioner,

v.

CHRISTIAN A. HERTER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH L. RAUH, JR.,
JOHN SHLAES,
1631 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Petitioner.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully prays that a writ of certiorari issue to the Court of Appeals to review the judgment in this case of the United States District Court for the District of Columbia.

OPINION BELOW

The opinion and judgment of the District Court are not yet reported, but are printed in Appendix A, *infra*, page 14.

JURISDICTION

Summary judgment was entered against petitioner by the United States District Court for the District of Columbia on October 1, 1959. Petitioner docketed his appeal in the Court of Appeals for the District of Columbia Circuit by filing the original record in the Court of Appeals on October 5, 1959. Petitioner is invoking the jurisdiction of the Court under 28 U.S.C. 1254 (1) to grant certiorari before judgment in the Court of Appeals because the relationship of the question here presented to those raised in pending petitions for certiorari in *Worthy* v. *Herter*, No. 444, and *Frank* v. *Herter*, No. 445, renders concurrent consideration of petitioner's case with *Worthy* and *Frank* a matter of "imperative and public importance." Rule 20; cf. *Bolling* v. *Sharpe*, 347 U.S. 497, 498.

QUESTION PRESENTED

Whether the Secretary of State has authority, under existing Presidential orders, statutes and constitutional provisions, to preclude travel to Communist China by American citizens, and in particular to bar a Member of Congress from such travel in pursuance of his legislative functions.

STATUTES INVOLVED

Extracts from statutes, Presidential orders, and regulations promulgated by the Secretary of State, which were considered by this Court in *Kent* v. *Dulles*, 357 U.S. 116, and upon which the respondent relies, are set forth in Appendix B, *infra*, page 15.

STATEMENT

Petitioner is a Member of Congress representing the Fourth Congressional District of the State of Oregon. Since his election to the Congress, petitioner has been

actively involved and interested in the foreign affairs concerns of the United States, including especially those relating to Communist China.[1] In connection with that interest, Congressman Porter had an extensive conversation in London in June of 1959 with the Second Secretary of the Chinese People's Republic's diplomatic delegation on subjects of concern to Communist China and the United States (see Congressional Record, September 1, 1959, p. 16192). In order further to pursue his Congressional interest in these matters, petitioner determined in June of 1959 to seek permission for a trip to Communist China to study conditions in that country and to appraise the character and purposes of its political leaders.

Congressman Porter holds a validly issued U. S. Passport containing the endorsement that "This passport is not valid for travel to: . . . those portions of China . . . under Communist control" (R. 48). On June 10, 1959, petitioner therefore wrote to respondent, the Secretary of State, applying for a passport revision permitting him to visit Communist China (R. 50). Petitioner informed the Secretary that: "The purpose of my visit is to learn about the conditions and potentialities of trade and other facts relating to our policies and legislative aspects." By letter of July 2, 1959, petitioner received a response to his request from an Assistant Secretary written "for the Secretary of State"; that response, relying upon the Court of Appeals opinion in the *Worthy* case, turned down Congressman Porter's request for a passport valid for Communist China travel without any apparent consideration

[1] Congressman Porter's special interest and concern in foreign relations matters is demonstrated by numerous of his speeches and insertions in the Congressional Record, as well as various bills and resolutions sponsored by him which are presently pending and which bear upon foreign relations matters. Some of these pending bills and resolutions, sponsored by petitioner, are: H.R. 4295, H.R. 6662, H.R. 7099, H.R. 7384, H. Con. Res. 138, H. Con. Res. 208, H. Con. Res. 297.

of the petitioner's Congressional interest in making a visit to Communist China (R. 56-57). Being informed thereafter that there were no other administrative remedies open to him (R. 50-51), petitioner filed this suit against the Secretary of State on August 27, 1959. In his complaint, petitioner asserts that the Secretary's action has impaired his rights as a Member of Congress as well as his freedom of travel as an American citizen, and that there is no statutory basis authorizing such limitation upon his freedom of movement; petitioner seeks declaratory and mandatory remedies for removal of that passport limitation (R. 51).

On September 15, 1959, petitioner moved for summary judgment (R. 70-71) on the basis of the complaint verified by petitioner's affidavit (R. 64), supplemented by a transcript of the testimony before a Senate Subcommittee by a representative of the Department of State concerning petitioner's case (R. 72-118); and by respondent Herter's personal answers to seven written interrogatories propounded by petitioner (R. 156-162).[2] In his affidavit petitioner also pointed out that during the latter part of this year he will be in the Orient, stopping at Japan and Okinawa, and possibly Formosa and Hong Kong, and stated that he deemed it necessary at that time:

> "in order fully and knowledgeably to perform my legislative functions as a Member of Congress, to visit Red China to gain first-hand information concerning conditions there, and also as to the character, purposes and designs, domestic and international, of the political leadership of that Nation, and the potentialities and circumstances of trade between Red China and the United States" (R. 64-65).

[2] The significant bearing upon the issues of the testimony of the State Department representative before the Senate on September 1, 1959, and of Secretary Herter's answers to the written interrogatories, is reviewed hereafter under "Reason for Granting the Writ."

On September 25, 1959, respondent filed a cross motion for summary judgment, and a memorandum in support thereof, relying primarily upon the decisions of the Court of Appeals in the *Worthy* and *Frank* cases as barring relief to petitioner (R. 127-148). These motions came on for hearing before the District Court on September 28, 1959; after hearing argument from counsel for petitioner (R. 4-36), the Court ruled for the respondent on the following grounds (R. 36, *infra*, Appendix A, p. 14):

> "First of all, I believe it is governed by the Frank case and the Worthy case. You are asking this Court to interfere with the Executive function of the foreign policy of the United States; that is number two; and number three, you are asking, in the circumstances, that an ordinary citizen, who happens to be a Congressman, not traveling on official Congressional business, be granted a passport when the Secretary of State concludes it would be to the best interests of the country not to do so."

Pursuant to this ruling, the District Court entered an order granting summary judgment for respondent (R. 166) and petitioner thereupon filed and docketed his appeal in the Court of Appeals for the District of Columbia Circuit. This petition is being filed before judgment in the Court of Appeals (cf. *Brown* v. *Board of Education*, 344 U.S. 1, 3; *Bolling* v. *Sharpe*, 347 U.S. 497, 498); pro forma affirmance below on the authority of *Worthy* and *Frank* would serve no useful purpose, and the questions pending before this Court on petitions for certiorari in *Worthy* and *Frank* are materially amplified and illumined by the demonstration in petitioner's case that the passport restrictions here involved constitute a wholly arbitrary invasion of fundamental constitutional rights and pervasive public interests.

REASON FOR GRANTING THE WRIT

This petition presents an important question of federal law which has not been, but should be, settled by this Court and which has been resolved below in a manner in conflict with the reasoning, and probably the result, in *Kent* v. *Dulles*, 357 U. S. 116.

The petitions for certiorari in *Worthy* and *Frank* indicate the urgent considerations requiring this Court's review of the State Department's policy of precluding travel to Communist China. Those petitions leave no doubt that the Department's policy trenches upon the rights and interests, both private and public, of vast numbers of American citizens and does so with even less statutory foundation than that found insufficient in last year's *Kent* decision.

Petitioner's case provides significant new dimensions to *Worthy* and *Frank* which underscore the imperative need for this Court's review of the State Department's passport restriction powers. The cavalier and unselective application of the Communist China ban to a Member of the Congress, whose Communist China travel request is in pursuit of the legislative interests of his congressional district and the nation, is the inevitable result of a Department policy lacking standards of reason and wholly without statutory basis. And the arbitrary nature of the Communist China proscription finds its ultimate demonstration in its application to Congressman Porter, with consequent impairment of his legislative interests and prerogatives, even though the purported justification for the travel ban—the possibility of danger or trouble for an American citizen in Communist China—admittedly has no applicability in Congressman Porter's case. Because petitioner's case provides the *reductio ad absurdum* of the policy applied by the State Department to Worthy and Frank, it affords final proof of the need for this Court's review of all three cases.

1. *The Communist China Travel Ban Takes no Account of the Vital Public Interests which that Policy Infringes.*

The written interrogatory answers of Secretary Herter in the present case reveal that the Department has "no separate policy" for the grant or denial of Communist China passports for Members of Congress or others with similar public interest in traveling to Communist China (R. 157), but simply lumps all citizens into the same excluded category (with the exception of those few newsmen, relatives and other persons who have succeeded in obtaining Communist China passports as a result of pressure upon the Department). It would seem that if the Secretary possesses the sweeping power of travel restriction which he claims, it is the minimal obligation of the Secretary not to apply that power with a cleaver that strikes down every applicant, whatever his interest, but only to apply it under careful criteria which takes account of the public interests involved in the particular application for Communist China travel. And of the various interests impaired by the Communist China ban, certainly the most compelling is that of a member of Congress whose ability properly to perform his legislative duties is curtailed by the denial of opportunity to visit the most populous nation in the world, whose conduct is a subject of daily concern in the Congress of the United States.

Petitioner desires to visit Communist China for the more knowledgeable performance of his Congressional functions, including sponsoring of legislation and debating and voting upon legislation on the floor of the House of Representatives bearing in various ways upon the subject of Communist China.[3] Certainly, the personal knowledge and information which Congressman Porter could gain by visiting Communist China and conversing with its

[3] The informing function of the Congress is one which this Court has itself most recently emphasized and upheld. *See Barenblatt v. United States*, 360 U. S. 109.

political leaders would materially assist him in performing his Congressional functions. Indeed, the Government does not suggest the contrary; it does not question that the refusal of a Communist China passport to petitioner denies him firsthand information of tangible benefit to him in the performance of his legislative functions.[4]

However, in ruling against petitioner, the District Court took the position that since petitioner does not hold a committee assignment for a Communist China trip, he is "an ordinary citizen . . . not traveling on official Congressional business" (R. 33). This view is, of course, plainly incorrect. The great pre-ponderance of duties that Congressmen are elected to perform and do perform do not fall within their committee assignments.[5] While Congressional

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[4] An interesting demonstration of the Government's own reluctance to deny the relationship between petitioner's requested Communist China visit and his Congressional duties comes from an excision made at the last moment in its "Memorandum of Points and Authorities" in support of its motion to dismiss filed in the District Court on the 25th of September. On page 12 of that memorandum, there was deleted by typewritten x's the italicized words of the sentence which had originally read:

> "Thus stripped of its trappings the contemplated travel to China is *[not that of an authorized member of Congress having an authorized legislative purpose, but]* that of a United States citizen who desires to enter an area which has been restricted for travel in the public interest (including the ultimate interest of preventing war), and which country has not yet, in fact, given him permission to enter within its borders" (R. 111).

[5] A precedent demonstrating that Congressmen not attending a session of the Congress nor on committee assignment nevertheless enjoy the protection of their office, relates to the punishment for contempt of Congress of Patrick Woods for an assault in 1870 upon another Congressman Charles Porter, in his hometown of Richmond, Virginia. The debate upon the contempt citation provides significant recognition of the official and non-private status of a Congressman wherever he is pursuing his public commitments. As stated by supporters of the contempt citation, Woods had, in attacking Congressman Porter, invaded

> "a privilege of the whole people of the United States to be molested in the persons of their Representatives during the entire session of Congress, so that laws may be enacted by themselves and for themselves through their Representatives, without let or hindrance from any man in Virginia or out of Virginia." (41st Cong., 2d Sess., Congressional Globe, p. 3254.)

committees constitute the eyes and ears of the Congress, in many important particulars, no judicial authority or legal commentator has yet suggested that individual Congressmen cannot use their own eyes and ears to obtain the knowledge and opinion upon which is predicated their discussion and vote on the floor of the House. There is ample recognition in 170 years of Congressional practice of the fact that most of the activities of Congressmen having no connection with their committee assignments nevertheless constitute official business which is attended by all the prerogatives of their public office.[6] The suggestion that petitioner's requested Communist China trip will be for any purpose other than one in connection with his Congressional duties is thus utterly unsupported by the record, and erroneous as a matter of fact and of law.

The denial of a Communist China passport to petitioner has been accomplished, according to the interrogatory answers by the Secretary, pursuant to a general policy of passport denial which is equally applicable to, and makes no distinction for, members of the Congress (R. 157). In determining the validity of that general policy, this Court will certainly want to consider that its effect is not only to impair the citizen's rights to travel, a right shared equally by petitioner, Worthy and Frank, but also to impose a serious burden upon members of the federal legislature in obtaining accurate, reliable and firsthand information concerning the most populous nation in the world, whose activities, intentions and purposes, domestic and

[6] Some of the areas where there is recognition of the official nature of the activities of individual Congressmen are those relating to Congressional franking privilege, right of individual insertions in the Congressional Record, official visits of inspection by members of the Congress, and the like. For instance, Congressman Porter who has no committee assignment bearing upon atomic energy, was nevertheless invited and attended as an official observer at the 1958 nuclear tests in the Pacific conducted by the Atomic Energy Commission, and expenses of his trip were recognized as "official Congressional business." Certainly, even though he had no pertinent committee assignment, he was not invited there as "an ordinary citizen".

international, have critical bearing upon numerous legislative measures regularly pending before the Congress.

2. *The Communist China Travel Ban Is Applied to Individual Applicants Arbitrarily without Adequate Standards or Reason for its Invocation.*

The record in petitioner's case also provides important demonstration and documentation of how utterly arbitrary is the general proscription upon passports for Red China travel presently being applied by the Department of State. Possibly the most significant demonstration in the record is the showing that the proscription on Communist China travel *is applied by the State Department to individual applicants even when the purported justification for that proscription has no applicability in the individual case.*[7] The major justification being advanced by the State Department for the ban upon Communist China passports relates to the inability of the Government to provide protection to citizens traveling in China and the consequent danger that an incident involving American citizens denied basic protections there will become a source of international embarrassment or difficulty. The Court of Appeals in *Worthy* makes reference to the problem of "American citizens in trouble abroad" and the "extrication of a citizen

[7] The arbitrariness of the Department's policy is also demonstrated by Secretary Herter's sworn interrogatory answers, revealing that he has not even personally reviewed and promulgated the present policy of passport denial (R. 156-161). While petitioner denies the existence of the power of passport restriction claimed by the Secretary, if the Secretary does indeed hold such power, the very least that is required by the constitutional rights there being impaired is that the policy be personally approved and promulgated, and seasonably and periodically reviewed, by the Secretary himself. So sweeping a proscription on freedom of travel cannot properly be committed to the power of some assistant or division head or the decision of a former Secretary rendered many years ago in the light of considerations no longer appropriate or germane.

from trouble in a foreign country" and thus characterizes the Government's position:

> "The areas named are potential or actual 'trouble spots,' where the presence of American citizens may place them in danger and further irritate our relations with the named countries . . ."

But it is a fact revealed by the present record that even in the absence of any problem relating to an American citizen placed "in danger" or "in trouble abroad" from which he may need "extrication," the State Department nevertheless denies him a Communist China passport. On September 1, 1959, Mr. John W. Hanes, Jr., Security Officer of the Department of State, appeared to testify as the representative of the Department before a Special Subcommittee of the Committee on Government Operations of the United States Senate holding hearings upon pending passport legislation. In the course of that hearing, at which the petitioner also appeared and testified, Mr. Hanes stated:

> "I am using Mr. Porter as an example, since he has put himself forward as an example, if he traveled to Red China. Incidentally, I am quite certain that the Communist Chinese would make very certain that nothing happened to him, because it would be to their propaganda advantage to see that nothing did . . ." (R. 106).

Unlike other cases wherein the Government has suggested that citizens might in some way be abused or injured while traveling in China, the record thus contains this significant recognition by the Department of State that the Chinese Government itself would be exceedingly solicitous of petitioner's safety and welfare; and yet, in the absence of the

primarily advanced justification for denial of Communist China passports, petitioner has nevertheless been denied such a passport.

CONCLUSION

It is submitted that the State Department's practice of denying American citizens passports valid for Communist China travel urgently requires this Court's review. That practice seems on its face inconsistent with the recent ruling of this Court in *Kent* v. *Dulles*, 357 U.S. 116, requiring statutory authorization before freedom of travel may be denied by State Department fiat. Indeed, the very Secretary of State responsible for the present policy invited such a review by this Court stating that "the whole legal area as regards passports is somewhat in doubt," and that he would "like to see a court test made" of the Department's authority to restrict passports.[8]

Especially where, as here, the primary issue relates to the sufficiency of Congressional authorization of the Executive action under challenge, is this Court's early review appropriate in order that the prerogatives of the Legislative branch may be fully preserved. And this Court's review becomes even more imperative in the light of the fact that important freedoms and prerogatives of great numbers of American citizens are at stake, including the prerogative of members of Congress to gain firsthand information concerning Communist China, information necessary to their fully knowledgeable performance of the legislative function itself.

Finally, the need for this Court's review of *Worthy*, of *Frank*, and of the instant case, is highlighted by the demonstration in the present record of the gross arbitrariness of the Communist China passport denial practice; a practice which takes no account of the degree of the par-

[8] *New York Times*, May 15, 1957, p. 10.

ticular private or public need for the travel requested, does not yet have the personal promulgation of the present Secretary of State, and is applied to applicants such as Congressman Porter even in the absence of the primary "protection of the citizen" justification upon which the Department rests its defense of its passport restriction practices.

For the foregoing reasons, it is submitted that the writ of certiorari should be granted.

Respectfully submitted.

Joseph L. Rauh, Jr.,
John Sharp,
1631 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Petitioner.

October, 1959.

APPENDIX A

Opinion and Judgment of the United States District Court for the District of Columbia

The Court: There is no need to make any reservations for future time. I am prepared to decide this case immediately.

First of all, I believe it is governed by the Frank case and the Worthy case. You are asking this Court to interfere with the Executive function of the foreign policy of the United States; that is number two; and number three, you are asking, in the circumstances, that an ordinary citizen, who happens to be a Congressman, not traveling on official congressional business, be granted a passport when the Secretary of State concludes it would be to the best interests of the country not to do so.

. . . . . .

ORDER

This cause having been heard on Plaintiff's Motion for Summary Judgment and Defendant's Cross Motion for Summary Judgment, and the Court having considered all of the record, the pleadings, affidavits, exhibits and memoranda of Points and Authorities filed herein, and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law.

Therefore it is now ORDERED by the Court on this 30th day of September, 1959 that Defendant's Cross Motion for Summary Judgment be, and the same is hereby granted, and that Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment be, and the same are hereby denied and the complaint be and the same is hereby dismissed, with costs to Plaintiff.

(s) MATTHEW F. MCGUIRE,
Judge.

APPENDIX B

22 U.S.C. § 211(a)

The Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. § 211 (a) provides, in pertinent parts, as follows:

> "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the Chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

Extract from 8 U.S.C. § 1185

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. § 1185, as codified, provides in pertinent part:

> "§ 1185. Travel control of citizens and aliens during war or national emergency. Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful

(1) (There follow restrictions enumerated (1) through (7) not here pertinent.)

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

Extract from Presidential Proclamation No. 3004, January 17, 1953, 67 Stat. c. 31

"Whereas Section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that Act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

Whereas the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

Whereas because of the exigencies of the international situation and of the national defense then existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States, and

Whereas the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

NOW, THEREFORE, I, HARRY S. TRUMAN, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as section 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized to revoke, modify, or amend such regulations as he may find the interests of the United States to require.

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provisions of that section or of his proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

Extracts from Executive Order No. 7856 of 1938, March 31, 1938, 3 F.R., Part 51

51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Extract from Regulations Issued by the Secretary of State, 22 C.F.R., Part 53

53.1 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his jour-

ney, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in §§ 53.2 and 53.3. No fee shall be collected by a diplomatic or consular officer of the United States for or in connection with such verification.

(7570-5)

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MEMORANDUM FOR
THE
RESPONDENT

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In the Supreme Court of the United States

OCTOBER TERM, 1959

CHARLES O. PORTER, PETITIONER

v.

CHRISTIAN A. HERTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

In the Supreme Court of the United States

OCTOBER TERM, 1959

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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1. The petition for a writ of certiorari asks the Court to review a District Court judgment in a civil action pending on appeal in the Court of Appeals for the District of Columbia Circuit, prior to rendition of judgment by the Court of Appeals, as authorized by 28 U.S.C. 1254(1) (Pet. 2).

The petitioner, a Member of Congress from the State of Oregon, holds a valid passport containing the following endorsement (R. 48):

> This passport is not valid for travel to the following areas under control of authorities with

> which the United States does not have diplomatic relations: Albania, Bulgaria,[1] and those portions of China, Korea and Viet Nam under Communist control.

On June 10, 1959, the petitioner wrote to the Secretary of State requesting, on behalf of himself and a number of persons who were to accompany him, permission to visit Communist China (R. 50, 56). The petitioner's stated purpose was to learn about conditions and trade potentialities and other facts relating to policy and legislative aspects (R. 56).

By letter of July 2, 1959, the Secretary replied in part as follows (*ibid.*):

> In 1952 the Department established the policy of not validating passports for Communist China. This policy is based on a number of considerations, among which are the fact that a state of unresolved conflict still exists between the United States and Communist China stemming from the latter's aggression against the United Nations in Korea and the fact that the Peiping regime continues to resort to force from time to time in the Taiwan Strait area. The emergency declared by President Truman in 1950 is still in effect.
>
> Another factor of importance is that in the absence of diplomatic relations with Communist China, it is not possible for the Government to provide the customary protection to Americans traveling on the China mainland. In addition, the Communist Chinese have consistently mal-

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[1] Restrictions on travel to Bulgaria were removed May 12, 1959. Department of State Press Release No. 322.

> treated Americans and continue to hold American citizens in prison as political hostages despite their pledge of September 10, 1955 to release them expeditiously. Another and important factor is the effort of the Communist Chinese to utilize trade and cultural contacts to promote political objectives hostile to our interests.
>
> * * * *
>
> In your case, I might add that as a Member of Congress your visit would be interpreted throughout Asia as well as by the Communist Chinese as a basic change in policy at the very time when the Communists are engaged in liquidating the Tibetan revolt, threatening war in the Taiwan Straits and showing increasing arrogance and contempt for international law and decency. [2]

The petitioner's application was denied.

The petitioner subsequently was authorized by the Committee on Post Office and Civil Service of the House of Representatives to travel to Okinawa and Japan in his official capacity (R. 152), "to take care of matters pertaining to civilian employee problems" (R. 153). However, the petitioner at no time requested or received Congressional authority to travel to Communist China (R. 149, 151).

On August 27, 1959, the petitioner filed a complaint in the United States District Court for the District of Columbia, seeking injunctive relief, and also asking a judgment declaring that as a member of Congress he has a right to travel to Communist China in the interest of his legislative duties and

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[2] Cf. the prohibitions of 18 U.S.C. 953 (the Logan Act).

that the Secretary's refusal to issue him a passport valid for travel to China is unlawful, and violates his constitutional rights as a citizen and a Congressman (R. 48-52). On September 14, 1959, the petitioner filed a motion for preliminary injunction (R. 61-63), followed the next day by a motion for summary judgment (R. 70-71). The Secretary then filed a motion to dismiss, or, in the alternative, a cross-motion for summary judgment (R. 127-128). The District Court, by order dated September 30, 1959, denied the petitioner's motions and dismissed the complaint (R. 166).

2. The petitioner suggests that the writ of certiorari should issue because his case presents the same questions as *Worthy* v. *Herter*, No. 444, this Term, and *Frank* v. *Herter*, No. 445, this Term (both pending on petitions for writs of certiorari), *viz.*, whether the policy of the Executive branch of the government of withholding official authorization to travel in Communist China infringes the rights of American citizens; whether that policy is authorized by statute; and whether its application to him is arbitrary and unreasonable. He suggests as an additional reason for the grant of the writ in his case that the government's policy, and its application, amount to an impairment of his "legislative interests and prerogatives," and that to enable him to perform properly his legislative duties he should be allowed to visit Communist China and converse with its political leaders (Pet. 6-8).

The petitioner concedes that the central issue involved in this case—the authority of the Secretary of

State, in the implementation of foreign policy, to refuse to validate passports of American citizens for travel to Communist China—is already before this Court in *Worthy* and *Frank*, *supra* (Pet. 6). The petitioner seeks to invoke the provisions of Rule 20 of the Rules of this Court and thus to deviate from the normal appellate processes on the ground that his case "provides significant new dimensions to *Worthy* and *Frank* which underscore the imperative need for this Court's review of the State Department's passport restriction powers" (Pet. 6).

We do not believe the fact that the petitioner is a Congressman adds anything to his claim, although that fact may bear upon the discretion to be exercised by the Secretary of State. If, as we assert, that exercise of discretion is not reversible by the courts, the petitioner's official position contributes nothing to the other two cases.

Therefore, we oppose the grant of a petition for certiorari in this case on the same grounds urged in our briefs in opposition in the *Frank* and *Worthy* cases. If the Court grants the writs in those cases, it may wish either to grant the writ in this case also, or hold it pending the disposition of those cases.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

NOVEMBER, 1959.

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